Supreme Court, U.S.
FILED
AUG 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-258

In the Supreme Court of the United States

OCTOBER TERM, 1986

WINSLOW MANUFACTURING, INC.,
and WATSCO, INC.,
Defendants-Petitioners,

vs.

PHILLIP KAIN, d/b/a BROCK-KAIN,
Plaintiff-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

GERALD SAWATZKY
(Counsel of Record)
700 Fourth Financial Center
Wichita, Kansas 67202
Telephone: 316/267-6371
Attorney for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Does this Court lack jurisdiction under 28 U.S.C. Sec. 2101(c) when final judgment by the court of appeals denying the appellate relief sought, recall of a prior mandate, was entered March 10, 1986 (more than 90 days prior to filing of the present petition); and petitioners' petition for rehearing filed June 4, 1986, was denied as untimely?

2. In *Kain v. Winslow Mfg.*, 736 F.2d 606 (10th Cir. 1984), cert. denied, 105 S.Ct. 1360 (1985), the court of appeals ordered the district court to reinstate plaintiff's judgment on a jury verdict, after the district court had denied defendants' motion for judgment n.o.v. but had set aside the judgment by granting a new trial on its own motion thirteen months later, in violation of Rule 59(d), FRCP. Subsequently re-entering the judgment as ordered, the district court invited the court of appeals to recall its mandate on the spurious ground that the appellate court had "misinterpreted" the 1981 new trial order.

The question is whether the court of appeals properly denied defendants' motion to recall the earlier mandate when all issues now raised had already been argued and decided in the first appeal.

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OPINIONS BELOW

Attached in the Appendix to this brief is the order of the court of appeals entered July 16, 1986, denying as untimely the petitioners' June 4, 1986, petition for rehearing of the March 10, 1986, order denying recall of the first appellate mandate.

JURISDICTION

A substantial jurisdictional question exists because the dispositive final judgment was entered March 10, 1986, in the form of an order denying a recall of the mandate in the first appeal (No. 82-1300). Petitioners filed a petition for rehearing of that final order and judgment on June 4, 1986, long after the fourteen day period permitted by Rule 40, FRAP. The petition for rehearing was denied as untimely on July 16, 1986, and thus did not serve to extend the 90 day period prescribed by 28 U.S.C. Sec. 2101(c). *Bowman v. Loperena,* 311 U.S. 262, 266 (1940).

Although a later "Order and Judgment" formally dismissing the second appeal (No. 85-2403) as "moot" was entered May 20, 1986, the substantive relief sought by petitioners in the second appeal was the recall of the mandate in the first appeal, which substantive relief was denied by the final order issued March 10, 1986.

The "judgment" brought before this Court for review by petitioners is the March 10, 1986, judgment rejecting petitioners' motion to recall the first mandate, which motion petitioners had filed in the second appeal. Petitioners do not seek review of the May 20, 1986, judgment formally dismissing its second appeal as "moot" on the ground that the March 10, 1986, judgment denying recall of the mandate in the first appeal had disposed of the second appeal. Thus, the order dismissing for mootness did not extend time to review the March 10, 1986, judgment. Cf., *Federal Trade Commission v. Minneapolis-Honeywell Co.,* 344 U.S. 206, 211 (1952); *United States v. Adams,* 383 U.S. 39, 41-42 (1966).

STATUTE INVOLVED

28 U.S.C. Sec. 2101(c), governing the jurisdictional question, provides:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

STATEMENT OF THE CASE

On October 7, 1980, plaintiff Kain received judgment on a jury verdict assessing damages against defendants.

Within 10 days, petitioners filed a motion for judgment n.o.v. under Rule 50(b), but declined to join a motion for new trial under Rule 59, as expressly permitted by Rule 50(b).

More than thirteen months later, November 13, 1981, the district court denied the motion for judgment n.o.v. as "unwarranted" because "The evidence and inferences in this case are such that reasonable persons may reach different conclusions . . ."; but granted a new trial.

In *Kain v. Winslow Mfg.*, 736 F.2d 606 (10th Cir. 1984), cert. denied, 105 S.Ct. 1360 (1985), the court of appeals, following a uniform line of federal appellate cases, ordered the 1980 judgment reinstated because Rule 50(b) did not authorize the district court to grant trial on its own motion if a motion for judgment n.o.v. thereunder was unwarranted. This Court denied review of that issue.

After criticizing the appellate reversal, the district court re-entered judgment as required; but purported to sustain petitioners' motion under Rule 60(b) seeking to "clarify" the 1981 order already reviewed and reversed. The "clarification" was in fact a material change of the 1981 order, turning it from an order denying the motion for judgment n.o.v. and one holding the motion to be "unwarranted" because there was conflicting evidence, into a totally contrary order, one holding the motion to be "warranted" because there was no evidence to support the verdict.

Petitioners appealed to the court of appeals from the re-entry of the judgment against them (the second appeal, No. 85-2403), asking the court to recall its mandate in the first appeal, No. 82-1300. The issues were then briefed on petitioners' motion to recall the mandate.

On March 10, 1986, the court of appeals denied the motion to recall its mandate, correctly pointing out that the decision and judgment in the prior appeal had specifically, as well as implicitly, decided the very issues which petitioners later submitted to the district court and were now again relying on to avoid the 1980 judgment against them. (A21-A25).

As Judge McWilliams aptly stated concerning the district court's purported "clarifying" order issued in 1985 after the first appeal:

"This is not a clarification, it is a fundamental change of the earlier order in which the motion for judgment n.o.v. was denied and characterized as 'unwarranted.'" (A24).

Petitioners, moreover, had made the same arguments attempting to misconstrue the 1981 order, in the prior

appeal, all of which arguments had been rejected by the court of appeals. Respondent Kain, in the first appeal, had documented a vast amount of evidence sustaining the jury verdict, demonstrating that the district court 1981 denial of a motion for judgment n.o.v. was required, and must be affirmed. The court of appeals did affirm the denial of the motion for judgment n.o.v., as its March 10, 1986, order makes clear:

". . . we held 'that where a district court concluded that a motion for judgment notwithstanding the verdict *must be, as it was in the instant case, denied,* then the district court is without authority under Rule 50(b) to order a new trial.' . . . In short, the district court's denial of judgment n.o.v. was essential to our holding, and as such, was implicitly affirmed on appeal. It cannot subsequently be modified by the court below. Accordingly, Winslow's motion [to recall the first mandate] must be denied." (A23). (Emphasis by the court).

ARGUMENT

Petitioners' assertion that the court of appeals departed from "the accepted and usual course of judicial proceeding" is frivolous. It is unsupported by any fact or rule of law.

The truth is that the court of appeals was forced on two occasions to correct the district court's neglect and disregard of the legal limits on its own jurisdiction. In the 1981 order, the district court had denied petitioners' motion for judgment n.o.v. because there was conflicting evidence sufficient to sustain the verdict; but the district court erroneously assumed that petitioners had filed a motion for new trial as well, and purported to grant a

non-existent motion for new trial (equivalent to granting a new trial on his own motion thirteen months after judgment on the verdict in violation of Rule 59(d), FRCP).

On the first appeal, by respondent Kain, petitioners argued that the district court's 1981 order granting a new trial was proper, whether or not the motion for judgment n.o.v. under Rule 50(b) had been warranted; but that in any event the 1981 order had found that motion to be "warranted" despite its specific ruling that the motion was "unwarranted" because of conflicting evidence. Petitioners also argued that judgment n.o.v. was proper because of lack of evidence supporting the verdict. Respondent Kain met all these contentions, and cited a mass of evidence supporting the denial of the motion for judgment n.o.v. The court of appeals ruled that the motion for judgment n.o.v. was correctly denied, and, following a uniform line of authority from various federal circuits, held that the district court had no authority to grant a new trial on its own motion thirteen months after the date of judgment on the jury verdict.

Thereafter, petitioners sought to avoid the mandate requiring re-entry of the judgment on the jury verdict by repeating to the district court some of their appellate arguments, i.e., that the 1981 order had in fact ruled the motion for judgment to be "warranted" rather than "unwarranted" and "denied" because of conflicting evidence, as it stated. The district court, expressing criticism of the required reinstatement of judgment, then purported to "clarify" the 1981 order by totally changing it, as we have noted. The court of appeals, in its March 10, 1986, order and judgment, pointed out the transparent nature of the attempt to modify the 1981 order. (A21-A25).

In short, the district court first exceeded its jurisdiction under the applicable federal rules; and later, at petitioners' invitation, sought to exceed the clear limits of its authority in order to evade an appellate mandate which corrected the first violation.

The only departure from the accepted and usual course of judicial proceedings, in this decade-long litigation, has been by the district court, at petitioners' urging. The district court's repeated transgression of the legal limits of its power has resulted in unreasonable delay and denial of justice to respondent Kain.

Petitioners' distortion of, and omission of, material facts of record, in the lower courts continues in this Court. Petitioners are unable to cite any authority or good reason for this Court's review of the judgment below.

CONCLUSION

The petition should be denied, with sanctions imposed on petitioners under Rule 49.2.

Respectfully submitted,

GERALD SAWATZKY
(Counsel of Record)
700 Fourth Financial Center
Wichita, Kansas 67202
Telephone: 316/267-6371
Attorney for Respondent

APPENDIX

MAY TERM - JULY 16, 1986.

Before the Honorable Stephanie K. Seymour, Honorable Robert H. McWilliams, Circuit Judges and Honorable Wesley E. Brown, District Court Judge.

PHILIP KAIN d/b/a BROCK-KAIN CO.,	)	
Plaintiff-Appellant,	)	
vs.	)	No. 82-1300
WINSLOW MANUFACTURING, INC. and WATSCO INC.,	)	
Defendants-Appellees.	)	

Defendants-appellees' petition for rehearing filed June 5, 1986, is denied as untimely. Fed.R.App.P. 40(a).

ROBERT L. HOECKER, Clerk
By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk